

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JACK CHRISTOPHER YEAGER,

Defendant-Appellant.

UNPUBLISHED

January 11, 2005

No. 245893

Muskegon Circuit Court

LC No. 00-045157-FH

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

JACK CHRISTOPHER YEAGER,

Defendant-Appellee.

No. 256104

Muskegon Circuit Court

LC No. 00-045157-FH

Before: Hoekstra, P.J., and Griffin and Borrello, JJ.

PER CURIAM.

In these consolidated appeals, defendant, in Docket No. 245893, appeals as of right from his jury trial conviction of two counts of fourth-degree criminal sexual conduct, MCL 750.520e (sexual contact with person at least thirteen years of age but less than sixteen years of age). Defendant was sentenced as an habitual offender, third offense, to enhanced concurrent terms of eighteen to thirty-six months' imprisonment. After he was sentenced, defendant moved for a new trial, arguing that he received ineffective assistance of counsel at trial based on an alleged failure by defense counsel to cross-examine the complainant and her mother regarding the complainant's credibility and state of mind. The trial court granted the motion. In Docket No. 256104, the prosecution appeals by leave granted the trial court's order granting defendant's motion for a new trial. We affirm the trial court's decision to grant a new trial to defendant in Docket No. 256104. We dismiss as moot defendant's appeal in Docket No. 245893.

In its appeal, the prosecution contends that the trial court committed error requiring reversal when it granted defendant a new trial on the basis of ineffective assistance of counsel.

We disagree and hold that the trial court correctly applied the law, and its findings of fact were not clearly erroneous.

I

In determining whether a defendant has been deprived of the effective assistance of counsel, the court must “find the facts, and then must decide whether those facts constitute a violation of the defendant’s constitutional right to effective assistance of counsel.” *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). On appeal, the trial court’s factual findings are reviewed for clear error, while its constitutional determinations are reviewed de novo. *Id.*; MCR 2.613(C).

A criminal defendant has the right to effective assistance of counsel. *Strickland v Washington*, 466 US 668, 686; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *People v Pubrat*, 451 Mich 589, 596; 548 NW2d 595 (1996). The well-settled rule in Michigan is that “[e]ffective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise.” *People v Solmonson*, 261 Mich App 657, 663; 683 NW2d 761 (2004). Thus, to justify reversal on the basis of ineffective assistance of counsel, a defendant must demonstrate how his counsel’s performance fell below an objective standard of reasonableness and show a reasonable probability that, absent counsel’s errors, the outcome at trial would have been different. *Id.* at 663-664. See also *People v Carbin*, 463 Mich 590, 599-600; 623 NW2d 884 (2001); *People v Pickens*, 446 Mich 298; 521 NW2d 797 (1994); *People v Harmon*, 248 Mich App 522, 531; 640 NW2d 314 (2001). “We evaluate defense counsel’s performance from counsel’s perspective at the time of the alleged error and in light of the circumstances.” *People v Grant*, 470 Mich 477, 487; 684 NW2d 686 (2004). The United States Supreme Court has ruled that a trial judge may presume a defendant was prejudiced by a defense counsel’s performance if defense counsel “‘entirely fails to subject the prosecution’s case to meaningful adversarial testing.’” *Bell v Cone*, 535 US 685, 696; 122 S Ct 1843; 152 L Ed 2d 914 (2002), quoting *People v Cronic*, 466 US 648, 659; 104 S Ct 2039; 80 L Ed 2d 657 (1984). In *Bell*, the Supreme Court further explained:

When we spoke in *Cronic* of the possibility of presuming prejudice based on an attorney’s failure to test the prosecutor’s case, we indicated that the attorney’s failure must be complete. We said “if counsel *entirely* fails to subject the prosecution’s case to meaningful adversarial testing.” *Cronic*, *supra* at 659 (emphasis added). Here, respondent’s argument is not that his counsel failed to oppose the prosecution throughout the sentencing proceeding as a whole, but that his counsel failed to do so at specific points. For purposes of distinguishing between the rule of *Strickland* and that of *Cronic*, this difference is not of degree but of kind. [*Id.* at 697.]

In *People v Pickens*, 446 Mich 298, 311; 521 NW2d 797 (1994), our Supreme Court stated:

Moreover, Michigan law has well established that “it is a duty which counsel so designated owes to his profession, to the court engaged in the trial, and to the cause of humanity and justice, not to withhold his assistance nor spare his best exertions, in the defense of one who has the double misfortune to be stricken

by poverty and accused of crime.” 1 Cooley (8th ed), *supra* at 700. More specifically, a court is obliged to intervene when defense counsel “accept[s] the confidence of the accused, and then betray[s] it by a feeble and heartless defense.” *Id.* at 704. In other words, Michigan law has long required that defense counsel present a reasonable defense.

“A defendant is entitled to have his counsel prepare, investigate, and present all substantial defenses.” *In re Ayres*, 239 Mich App 8, 22; 608 NW2d 132 (1999). “Where there is a claim that counsel was ineffective for failing to raise a defense, the defendant must show that he made a good-faith effort to avail himself of the right to present a particular defense and that the defense of which he was deprived was substantial.” *Id.* A substantial defense is one that reasonably could have changed the outcome of the trial. *Id.* This Court will not substitute its judgment for that of trial counsel regarding matters of trial strategy, nor will it assess counsel’s competence with the benefit of hindsight. *People v Matuszak*, 263 Mich App 42, 58; 687 NW2d 342 (2004).

II

Here, at the time of the alleged improper sexual contact by defendant, the complainant was thirteen years old and lived with her mother and three brothers. Defendant, a friend of the complainant’s mother who was known to the complainant, had been staying at the house for three days because he was in between jobs. The alleged sexual contact purportedly occurred one evening while the complainant’s mother was away and defendant was babysitting the complainant and her brothers.

The prosecution maintains that the trial court misapplied *Cronic*, *supra*, and improperly presumed prejudice under circumstances where it is clear that defense counsel did not *completely* fail to subject prosecution witnesses to adversarial testing and succeeded in having defendant acquitted of second-degree criminal sexual conduct. The prosecution further argues that the trial court erroneously used the benefit of hindsight to second-guess defense counsel’s strategy. We disagree.

The primary focus of defendant’s ineffective assistance of counsel claim was that defense counsel failed to cross-examine the complainant and her mother about matters in the police report regarding the complainant’s counseling, medication, and state of mind. As evidenced by the record at defendant’s *Ginther*¹ hearing, defendant believed that defense counsel should have attacked the complainant’s credibility and mental state using the following portion of the police report:

During the rapport building portion of the interview, R/O was advised by [the complainant] that she was seeing a counselor at CMH. She stated that approximately five months ago she was having some problems. She was upset with her mother and upset with the fact that her brothers were not paying any

¹ *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

attention to what she had to say when she babysat for them. She felt that she was stressed out and she had begun to think about setting the house on fire. As a result of this, she is seeking counseling through CMH and is presently taking an antidepressant.

The complainant's mother also provided the following information in the police report:

R/O questioned [the complainant's mother] in regards to CMH counseling that [the complainant] is receiving. [The complainant's mother] stated that [the complainant] has been diagnosed with Post Traumatic Stress Disorder because of the situation with her father. She is currently being counseled . . . at CMH.

In addition, the investigating detective reported that the complainant's mother told him that the complainant's brothers had been sexually molested by their father, but that the complainant had denied being molested by him.

The trial court, in its opinion granting defendant's motion for a new trial, found that, because the witnesses' credibility was a "lynchpin" issue, defendant was irretrievably prejudiced by defense counsel's deficient performance, i.e., failure to cross-examine the complainant and her mother concerning the police report. The trial court stated, in pertinent part:

At the *Ginther* hearing, Defendant emphasized the fact that trial counsel presented virtually no challenge to the theory put forth by the Prosecution. Upon examination by Defendant's appellant [sic] counsel, trial counsel concurred that that credibility was a lynchpin issue, ripe for scrutiny. In spite of such concession, trial counsel not only failed to mount a credible cross-examination of either of the prosecution witnesses, his explanation (i.e. trial strategy) though facially sufficient, was woefully lacking in substance. Appellate counsel very effectively contrasted the witnesses, their subjection to cross-examination, and the propriety of trial counsel's approach to each.

Trial counsel ostensibly utilized the tact of "not wanting to alienate the jury" with not only the questioning of the victim, but with the victim's mother and the investigating detective. Surely, trial counsel's approach to three disparately situated witnesses would justify disparate tactics of cross-examination.

While taking the cautions pronounced by *Strickland* into account, this Court would be remiss in shying away from the very real and concrete fact that credibility is the fulcrum upon which this case turned. The jury must be given sufficient evidence with which to evaluate the witnesses in order to subject the prosecution's case to the "adversarial testing" required by *Strickland*.

* * *

Although the issue of ineffective assistance allows great latitude for trial strategy, it must be noted that this Court sat through the entire proceeding, and is hard pressed to characterize trial counsel's approach as strategic. To be blunt, there was no articulable strategy presented by defense counsel. This Court adopts

the very pointed critique of the Court in *Berryman v Morton*, 100 F3d 1089 (CA 3, NJ), 1996) [sic]:

“ . . . Having no trial strategy, defense counsel improvised as they went along, proceeding from blunder to blunder . . . ” *Berryman* at 1096.

In *People v Brosic* [*Brasic*], 171 Mich App 222; [429 NW2d 860] (1988) the Michigan Court of Appeals indicated that ineffective assistance of counsel requires a showing that “there was something counsel could have used to impeach the witness, but did not.” *Brosic* [sic] at 232-33. Trial counsel failed, at the very least, to use the police report to explore prior inconsistent statements regarding victim’s testimony or to use the police report summarizing the investigation and interviews to challenge Det. Sowles, or the victim’s mother’s testimony. Trial counsel failed to explore the victim’s emotional stability or the possibility that she suffered from post-traumatic stress syndrome. Such issues at the very least call into question the stability, motivation and/or veracity of those who were allowed to testify in such a linear fashion.

In *United States v Cronic*, 466 US 648 (1984) the US [Supreme] Court found that presumptive unreliability exists where defense counsel completely failed to subject the prosecution’s witnesses to any meaningful adversarial testing, and prejudice is presumed.

It is the finding of this Court that trial counsel’s performance was deficient, and ineffective assistance of counsel as required by the Sixth Amendment, and that as a result the defendant was prejudiced. Accordingly, defendant’s Motion for New Trial is granted.

The prosecution’s argument that the trial court improperly applied the presumption of prejudice set forth in *Cronic*, *supra*, rather than making an actual finding of prejudice, is without merit. Initially, we note that the trial court, throughout its opinion, acknowledged the applicability of the *Strickland* objective standard to this case. Moreover, it is clear from the record that the trial court, while citing *Cronic*, did not misapply the presumption of prejudice, but, rather, adhered to the two-pronged *Strickland* standard when it found that “trial counsel’s performance was deficient, and ineffective assistance of counsel as required by the Sixth Amendment, and that as a result the defendant was prejudiced.” The trial court’s opinion reflects that the court considered both the objective standard and the prejudice prong. We conclude that the trial court correctly applied the law as set forth in *Strickland* and *Pickens* and that its findings of fact were not clearly erroneous. *People v Leblanc*, *supra*.

At trial, defense counsel made brief opening and closing remarks. Defense counsel also conducted brief cross-examinations of the complainant, her mother, and the investigating detective. Defendant was also called as a witness by defense counsel, corroborating his statements to the police that he never went into the complainant’s room and that he believed the complainant had dreamt about the entire sexual encounter. As accurately noted by the trial court, the principal issue in this case was the credibility of the complainant versus the credibility of defendant, with the credibility of the complainant being “the lynchpin” of the case. There was

no physical evidence to confirm the complainant's claims of sexual touchings. The primary focus of defendant's ineffective assistance of counsel claim was that defense counsel failed to cross-examine the complainant and her mother about matters in the police report, which included the complainant's counseling and medication. As defendant correctly points out, defense counsel's cross-examination of these witnesses was brief and made no reference to the matters contained in the police report. In the words of Justice Cooley, it was a "feeble and heartless defense." *People v Pickens, supra*.

At the *Ginther* hearing, defense counsel explained that defendant's trial was his first criminal jury trial, and that defendant previously had been represented by four or five attorneys before he took over the case. Defense counsel testified that the strategy he and defendant agreed on was that the complainant's allegations were the product of a nightmare and sleepwalking because this defense was consistent with what defendant told him about the evening in question² and information recorded in the police report. Defense counsel indicated that he did not believe information in the police report regarding sexual abuse of the complainant's brothers by their father was relevant to this case. Defense counsel further testified that he did not cross-examine the complainant about her statements about counseling recorded in the police report, in part, because he apparently misunderstood a prior ruling made by the court denying inspection of the complainant's counseling record and, thus, believed that he was not allowed to "get into her CMH, her counseling":

Q And why did you not cross examine her on the basis of statements that she made to Detective Sowles?

A Because I could not get into her CMH, her counseling. That was not allowed.

However, defense counsel later testified at the *Ginther* hearing that he believed he could have cross-examined the complainant using the contents of the police report, and he also realized that he could always cross-examine a witness using prior inconsistent statements:

Q And did you somehow understand that because you couldn't have access to her medical records that you could not cross examine her on the basis of statements that she made to the investigating officer? I mean where does that come in? I don't see the connection.

A Well, I guess, I guess I just felt at the time that because it couldn't, I couldn't have her, any kind of possible counseling records that if I were to ask her anything it would seem to be a useless gesture. That even if, even if she said, admitted to that stuff or not I wouldn't have any, any concrete thing in the record to tell me what, if anything, she was being counseled about, what if any kind of medication she was, she was, she may have

² In his statements to the police and his testimony at trial, defendant maintained that the complainant had come out of her bedroom on the night in question, delirious and acting as though she had awakened from a bad dream.

been taking. I didn't have any, any basis to impeach her except for a police report. I wanted something a little bit more concrete, actually I wanted something a lot more concrete.

In any event, defense counsel testified at the *Ginther* hearing that he did not cross-examine the complainant about her thoughts of setting fire to the house because it may not be relevant to her credibility. Defense counsel admitted that the complainant's thoughts of burning down the house were "extreme" and could have shed some light on her state of mind. However, defense counsel explained that he did not question the complainant about this statement because the strategy was not to demonstrate that the complainant was prone to exaggeration, but that the entire encounter was a figment of her imagination, i.e., a result of a bad dream.

He also did not believe the fact that the complainant was receiving counseling was relevant to her propensity to fabricate information, or to have nightmares or sleepwalk; there was nothing in the police report indicating that the complainant had a history of fabrication. Moreover, defense counsel indicated that, from his observations of the jury, he believed that some of the jurors were "very hostile." He did not want to do anything that would increase the sympathy the jury might already be feeling for the complainant:

I didn't want to beat up on her so bad that she would possibly gain some more sympathy with the jury. I had to look at that he was facing a CSC two charge. And I felt it would be, to me it would be somewhat of a victory if he was only convicted of CSC four.

Defense counsel explained that, for similar reasons, he did not cross-examine the complainant's mother about her daughter's diagnosis of post-traumatic stress syndrome and what the complainant's father did that caused the complainant to suffer from the disorder. He also admitted that, for reasons he could not recall, he did not ask the complainant if she had told the detective that she was taking anti-depressants, as indicated in the police report, even though the complainant testified on direct examination that she was not taking any medication at the time. Defense counsel also failed to cross-examine the complainant about her statement in the police report that "[s]he was upset with her mother and upset with the fact that her brothers were not paying any attention to what she had to say when she babysat for them." This statement could have been used to indicate that the complainant was trying to get attention from her mother and brothers. By asking the complainant about this statement, defense counsel could have made the complainant's testimony about defendant's action appear to be a cry for attention.

In sum, defense counsel's cross-examination of the complainant, her mother, and the investigating detective was brief and feeble. It failed to elicit readily available information that would have undermined the complainant's credibility and made no reference to important information contained in the police report which could have been used to challenge the testimony of the prosecution witnesses. Defense counsel essentially left testimony and contradictory statements made by the complainant to the police unchallenged. Indeed, he was under the mistaken belief that he could not question any of these witnesses with regard to any of the information contained in the police report. Moreover, defendant's testimony at the *Ginther* hearing established that defendant attempted to get his counsel to further challenge the complainant on cross-examination. Certainly, the complainant's mental state impacted the very

core of the case, particularly given the lack of physical evidence confirming the allegations and the fact that the complainant's credibility was the "lynchpin" of the prosecution's case. As the trial court noted in its findings of fact, the complainant's emotional stability or the fact that she suffered from post-traumatic stress syndrome "call[s] into question the stability, motivation and/or veracity of those who were allowed to testify in such a linear fashion." Here, defense counsel did not pursue a sound trial strategy – "one that is developed in concert with an investigation that is adequately supported by reasonable professional judgments." *Grant, supra* at 486.

III

Following our review, we conclude that the trial court did not clearly err in holding that trial counsel provided constitutionally deficient representation to defendant during trial and that there is a reasonable probability that, absent counsel's errors, the outcome of the trial would have been different. The trial court's rulings, that defense counsel's failure to pursue any cognizable defense or even the most obvious and rudimentary defense warranted by the evidence, i.e., scrutinizing the mental stability of the complainant, fell below an objective standard of performance, and that defendant was intolerably prejudiced by counsel's deficient performance, were not clearly erroneous and correctly applied the law.

The fact that the jury convicted defendant of a lesser offense, based on an absence of an authority relationship,³ does not show an absence of prejudice. On the contrary, the convictions rendered still establish that the jury accepted the complainant's testimony that the sexual touchings occurred. Indeed, prejudice is readily apparent in this credibility contest, where a vigorous cross-examination of the prosecution witnesses regarding the police report would have seriously weakened their credibility. In sum, the trial court did not commit error requiring reversal in granting defendant's motion for new trial on the basis of ineffective assistance of counsel.

In view of our disposition in Docket No. 256104, the issues presented by defendant in Docket No. 245893 become moot. See *People v Rutherford*, 208 Mich App 198, 204; 526 NW2d 620 (1994). However, with regard to defendant's claim that the trial court committed error requiring reversal by denying his motion to compel production of the complainant's counseling records for an in-camera inspection, defendant shall have the opportunity, on remand, to present additional evidence, if any, in support of his motion. See *People v Stanaway*, 446 Mich 643, 677; 521 NW2d 557 (1994). On remand, if defendant can establish a reasonable probability that the privileged counseling records are likely to contain material information necessary to his defense, the trial court should conduct an in-camera review of the records to ascertain whether they contain evidence necessary for the defense. *Id.*

³ Defendant was acquitted of CSC II.

IV

Affirmed with respect to Docket No. 256104, and remanded for additional proceedings consistent with this opinion. We do not retain jurisdiction. Docket No. 245893 is dismissed as moot.

/s/ Joel P. Hoekstra
/s/ Richard Allen Griffin
/s/ Stephen L. Borrello